Journal of Private International Law Colloquium 2010 – Call for papers

The second biannual colloquium will be held on 1 October 2010, in Brisbane, Queensland, Australia and will be hosted by the SocioLegal Research Centre at Griffith University.

The colloquium takes the form of a roundtable discussion in which participants present and discuss their papers, which will be pre-circulated. Participants will be invited to submit their papers for publication to the *Journal of Private International Law*, subject to the Journal's normal refereeing process.

There are a small number of places on the program which may be filled by the outcome of this call for papers, subject also to a reviewing process.

If you are interested in presenting a paper at the colloquium, please contact Professor Mary Keyes, m.keyes@griffith.edu.au before 1 June 2010.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2010)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

This issue contains *inter alia* some of the papers presented at the Brussels I Conference in Heidelberg last December. The other papers were published in the

previous issue.

Here is the contents:

- ***Paul Oberhammer***: "The Abolition of Exequatur"

The Commission's Report on the reform of the Brussels Regulation points out that "the abolition of the exequatur procedure in all matters covered by the Regulation" is the "main objective of the revision of the Regulation". In this context, the Green Paper raises the following two questions: "Are you of the opinion that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)? And in that case, are you of the opinion that some safeguards should be maintained in order to allow for such an abolition of exequatur? And in that case, which ones?"4 In the following discussion, I will try to answer these questions. As the problem is multifaceted, I can do so only in a very sketchy fashion.

- ***Andrew Dickinson***: "Provisional Measures in the "Brussels I" Review – Disturbing the Status Quo?"

Art. 31 of the Brussels I Regulation provides: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." This provision closely mirrors Art. 24 of the Brussels and Lugano Conventions. Sitting (and, perhaps, partly hidden from view) between the provisions concerning, on the one hand, substantive jurisdiction and, on the other, the recognition and enforcement of judgments, the treatment of provisional measures attracted very little attention in the early history of those Conventions, being fleetingly considered in each of the official reports. That Art. 31 emerged intact from the process leading to the conversion of the Brussels Convention into a Community Regulation at the turn of the century is, however, surprising for the following reasons. First, as the Recitals to the Regulation emphasise, the predominant concern of the Community legislator was to adopt "highly predictable" rules of jurisdiction "founded on the principle that jurisdiction is generally based on the defendant's domicile". Art. 31 achieves neither objective. The delegation to national rules of jurisdiction

(including rules of the kinds prohibited by Art. 3) creates a non-uniform landscape in which it is not possible for litigants to determine on the basis of the Regulation alone whether a particular court is competent to grant provisional measures. Secondly, the Commission itself in its 1997 Proposal for a Council Act establishing a revised Convention on jurisdiction and judgments had suggested replacing Art. 24 with a narrower provision, limiting the exorbitant power to grant provisional including protective measures (as defined) to cases of urgency in which the measure in question would be enforced within the territory of the State granting it. Thirdly, as the Commission noted in the explanatory memorandum accompanying its initial proposal for the Regulation in 1999, the Court of Justice (ECJ) had in the previous year been faced with two important references concerning Art. 24 of the Brussels Convention (Van Uden v. Firma Deco Line and Mietz v. Intership Yachting). In those decisions, the ECJ had recognised Art. 24 as an anomalous provision whose propensity to disturb the scheme established by the Brussels Convention needed to be curtailed. In response, the Court revisited Art. 24's place in the jurisdictional scheme established by the Convention and reshaped it in ways that the Court found to be implicit in its wording and objectives but which are not readily apparent from a study of the text alone. A codification of some aspects, at least, of these rulings therefore appeared desirable. The need for caution in applying Art. 31 of the Regulation and its counterpart in Art. 31 of the Lugano II Convention (the successor instrument to the Lugano Convention) is highlighted by the commentary in the Heidelberg Report on the functioning of the Brussels I Regulation, in the Commission's recent Report and Green Paper on the review of the Regulation and in the Explanatory Report on the Lugano II Convention by Professor Fausto Pocar. Although, for rather unsatisfactory reasons, the text of Art. 31 has been left intact in the Lugano II Convention, its revision is long overdue and this should be one of the objectives of the Brussels I review. By way of background, this article considers, briefly, the ECJ's decisions in Denilauler, Van Uden and Mietz (Section II.) and the proposals advanced by the authors of the Heidelberg Report and the Commission (Sections III. and IV.) before turning to address the issues raised by Art. 31 in its present form and possible solutions (Section V.).

- ***Stephan Rammeloo***: "Chartervertrag cum annexis – Art. 4 Abs. 2, 4 und 5 EVÜ" – the English abstract reads as follows:

October 6, 2009, the ECJ gave interpretative rulings in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in preliminary proceedings centered round the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ("objective proper law test"), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in relation to subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

- ***Florian Eichel***: "Inhaltskontrolle von AGB-Schiedsklauseln im internationalen Handelsverkehr" – the English abstract reads as follows:

This essay discusses a recent decision of a German Oberlandesgericht (Court of Appeal) which denied enforcement of a US arbitral award on the ground of Art. V (1)(a) New York Convention (NYC). The court deemed a B2B-arbitration clause invalid for substantive unconscionability (s. 307 German Civil Code – BGB). The clause was contained in a Dutch-German franchise form and determined New York as place of arbitration. The essay argues that substantive unconscionability may not simply be based on the remoteness of the place of arbitration from the weaker party's domicile. Rather, in considering the validity of the clause a court should follow a twofold examination: First, it has to consider the formal unconscionability by means of s. 305c (1) BGB. According to this provision, a clause is invalid if it is of a surprising character, i.e. in no way connected to the negotiations or the execution of the contract. The reference to s. 305c (1) BGB is permissible even under the regime of the NYC as the latter only provides formal requirements for the arbitration agreement itself, but not for the procedural agreement in question designating the place of arbitration and the lex arbitri. If the party fails to prove the surprising character, one can in a second step deem the clause unconscionable pursuant to s. 307 BGB. However, this verdict requires a thorough examination as to whether the arbitral procedure in a whole, and not just the place of arbitration, deprived the defendant of his day in court.

- ***Reinhold Geimer*** on the judgment of the ECJ of 11 June 2009 (C-564/07) as well as the decisions of the German Federal Court of Justice of 5 March 2009 (IX ZB 192/07) and of 20 January 2009 (VIII ZB 47/08): "Einige Facetten des internationalen Zustellungsrechts und anderes mehr im Rückspiegel der neueren Rechtsprechung"
- ***Nina Trunk:*** "Anwendbarkeit der Wanderarbeitnehmerverordnung auf die Haftungsbefreiung bei Arbeitsunfällen" – the English abstract reads as follows:

In its ruling VI ZR 105/07 of 15th July 2008 the German Federal Court of Justice had to decide on a case, where an employee of a dutch employer has been injured in a car accident caused by his driving German colleague on a weekend visit to Germany. The crucial question is, if in this case the German regulations, which determine that the civil liability of the employer and/or its employees is excluded in cases of work accidents, applies or if Dutch law, which does not know a corresponding exclusion of liability, is applicable. This recension deals with the mandatory Character of the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and their applicability. In accordance with the decision of the German Federal Court of Justice it comes to the conclusion that concerning the question of exclusion of liability, Dutch law applies and explains why this result is compatible with the freedom of services provided in Art. 49 EU Treaty.

- ***Peter Behrens***: "Anwendung des deutschen Eigenkapitalersatzrechts auf Scheinauslandsgesellschaften" – the English abstract reads as follows:

This is the first decision of a German insolvency court applying the new German legal rules on shareholder loans in case of insolvency of a pseudo-foreign company (i.e. an English private company limited by shares doing business exclusively in Germany). The court based its jurisdiction correctly on Article 3(1)(1) of the European Insolvency Regulation (EIR), because the debtor company's centre of main interests was clearly situated in Germany. The reasoning on the private international law issues was less convincing however. The court simply applied German law and held the insolvent company's shareholder liable towards the insolvent company for repayment of a sum which the shareholder had received from the company as redemption of a loan

granted by the shareholder to the company. The redemption had occurred in 2007 at a time when the company was already insolvent. Until October 2008, the shareholder-creditor's liability towards the company resulted from relevant provisions in the GmbHG (Limited Liability Companies Act). Since November 2008, these provisions are, however, transferred to the Insolvency Act and they now establish the voidability of the redemption of a shareholder-creditor's loan which occurred within one year before the petition for insolvency proceedings was filed. This change of the law may have had an impact upon the highly disputed characterisation of a shareholder-creditor's liability towards an insolvent company. Before November 2008, it could have been characterised as a matter of company law which should be subject to the "proper law" of the company (in this case: English law). Since November 2008, there may be better reasons for a characterisation as a matter of insolvency law. The court preferred the latter characterization for both, the old and the new law, without justifying its position by adequate reasoning and, what is more, without taking any notice of European Union law. According to Article 4(2)(m) EIR, voidability of a transaction is clearly a question of insolvency law, but Article 13 EIR limits the application of Article 4(2)(m) EIR under certain circumstances which may or may not have been present in this case. The court's decision therefore suffers from insufficient reasoning.

- ***Hans Hoyer*** on the judgment of the Higher Regional Court Munich of 5 December 2008 (33 Wx 266/08): "Nachlassverwaltung durch Betreuer im deutsch-österreichischen Rechtsverkehr""
- ***Philipp Sticherling***: "Türkisches Erbrecht und deutscher Erbschein" – the English abstract reads as follows:

The author discusses a decision of the Braunschweig district court (Landgericht) in a proceeding concerning the grant of an inheritance certificate. The bequeather has been an Turkish citizen with movable estate in Germany. The District Court has decided that German courts also have jurisdiction for the grant of the inheritance certificate. According to the decision of the District Court, the estate agreement in the consular agreement of 28 May 1929 between the German Empire and Turkey does not command the exclusive jurisdiction of Turkish courts for proceedings concerning the grant of inheritance certificates. The decision has been taken under the provisions of the Act on Voluntary Jurisdiction (Gesetz über die Angelegenheiten der

freiwilligen Gerichtsbarkeit – FGG) that was in effect until 31 August 2009. With the Act on the Reform of the Act on Voluntary Jurisdiction, as from 1 September 2009 the Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG) has replaced the Act on Voluntary Jurisdiction. The question of international jurisdiction remains relevant under the new legislation. The author shows the differences between the new procedural rules under the reformed act and the old Act on Voluntary Jurisdiction.

- ***Zeynep Derya Tarman***: "Das neue Staatsangehörigkeitsgesetz in der Türkei" – the English abstract reads as follows:

The article will firstly give an overview of the new Turkish Nationality Act from 29.5.2009, with an emphasis on the reasons for the need of this new Act. Secondly, it will analyze the provisions of the new Turkish Nationality Act pertaining to the acquisition and loss of nationality, and thirdly it will give an insight to the multiple nationality under the new code.

- ***Hakan Albas/Serdar Nart*** on the acquisition of real estate by non-residents in Turkey: "Neues zum Erwerb von Grundstücken durch Ausländer in der Türkei"
- ***Christel Mindach***: "Weiterentwicklung des Zivilrechts und Internationalen Privatrechts in Russland" – the English abstract reads as follows:

The "Web portal of Private International Law of Russia" published a range of documents for further development of civil legislation including private international law of Russian Federation. The initiative goes back to two Decrees of the Russian President No. 1108 and No. 1105, dated July 18th, 2008. These Presidential Decrees obliged the "Council for Codification and Improvement of Civil Legislation" jointly with the "Research Centre for Private Law" both attached the President, to prepare a draft for development of civil legislation up to June 1, 2009. This article gives first information especially about this part of draft, dealing with amendment of some provisions of private international law.

- ***Sergej Kopylov/Marcus A. Hofmann***: "Das Verfahren vor dem Wirtschaftsgericht (Arbitragegericht) der Russischen Föderation" – the English abstract reads as follows:

This paper deals with a presentation of the proceedings before the national economic court (arbitration court) of the Russian Federation (RF) in the first instance. Frequently, a Russian and a foreign business partner contract under Russian law and agree on a venue in Russia. Especially in times of financial crisis, the contractors are trying – whether because of liquidity or economic reasons – to turn away from the long-term contracts that have often been entered into before the crisis, which is usually only possible by judicial decision. As a result, the European companies that are active in the Russian Federation are commonly sued by their Russian partners. The emphasis of this paper is based on a view from the perspective of the German defendants, describing the process and details of the procedure and explaining a useful approach in cases where a defendant finds himself before the arbitrage court.

- ***Peter Kindler*** on the monograph by Günther H. Roth, Vorgaben der Niederlassungsfreiheit für das Kapitalgesellschaftsrecht. Exigences de la liberté d'établissement pour le droit des sociétés de capitaux, 2010 (including a French translation): "'Cadbury-Schweppes': Eine Nachlese zum internationalen Gesellschaftsrecht"
- ***Heinz-Peter Mansel*** on the 80th birthday of Richard M. Buxbaum: "Richard M. Buxbaum zum 80. Geburtstag"
- ***Erik Jayme/Carl Friedrich Nordmeier*** on the 2009 meeting of the German-Lusitanian lawyers' association in Brasília: "Grenzüberschreitende Dimensionen des Privatrechts – Tagung der Deutsch-Lusitanischen Juristenvereinigung in Brasília"
- ***Zou Guoyong:*** obituary in honour of Han Depei

Pending Cases at the U.S. Supreme Court

As the current term of the United States Supreme Court winds-down, two decisions remain outstanding that are of some interest to the readers of this site.

The first pending case is *Abbott v. Abbott*, which was argued in January. As previewed at length on this site (here and here), *Abbott* is a rare family-law case before the Supreme Court involving an American child taken to Texas from his home in Chile by his mother, without his father's consent. Under the 1980 Hague Convention on the Civil Aspects of Child Abduction, children must be automatically returned to the country from which they are taken, so long as the removal was "in breach of rights of custody." The Supreme Court is asked to decide whether the father had a "right of custody" under the treaty, because at the time of the divorce the Chilean family court—and Chilean law as a matter of course—entered a "*ne exeat*" order prohibiting either parent from removing the child from the country without the consent of the other. A discussion of the argument, and the issues raised by the justices, have been previously discussed on this site here.

The second pending case is *Morrison, et al., v. National Australia Bank, et al.* (08-1191), which was argued in March. As some commentators have "read[] the tea leaves" in *Morrison*, it looks as though the United States Supreme Court could be on the verge of deciding one of the more significant cases on the presumption against extraterritoriality in recent memory, and restricting the prescriptive jurisdiction of the Securities and Exchange Act of 1934 in the process. The case involves a class action brought by foreign plaintiffs against a foreign stock issuer on a foreign exchange for alleged fraud that occurred on foreign soil. At oral argument, the justices strongly questioned whether the Act should extend to reach such conduct, and gave strong indications that it was prepared to apply the territorial limitations of *Hoffman-La Rouche v. Empagran* to the securities fraud context.

The case at one time had an American investor in it, but as it reached the Court, only three Australians who bought stock in that country's largest private bank, and did so on Australia's stock market, remained involved as plaintiffs. That set of

facts alone seemed to bother the Justices. “This case,” Justice Ruth Bader Ginsburg said, “has Australia written all over it.…Isn’t the most appropriate choice of law that of Australia, not the United States? . . . What conflict of laws is all about is you have two jurisdictions, both with an interest in applying their own law, but sometimes one defers to the other.” Other justices, too, acknowledged that conflicts is the root of this issue. Justice Alito asked the plaintiffs to “assume that on the facts of this case they could not prevail under Australian law in the Australian court system. Then what United States interest is there that should override that?” According to Justice Scalia, plaintiffs “are talking about a misrepresentation … made in Australia to Australian purchasers; it ought to be up to [Australia] to decide . . . whether there has been a misrepresentation, point one; and whether it’s been relied upon by the … plaintiffs, point two . . . And here you are dragging the American courts into it.”

Others, like Justice Breyer, had also keenly noticed the fact that the governments of Australia, Britain and France had submitted briefs urging the Court not to let American courts enforcing U.S. law tread on other countries’ sovereign territory and right to regulate their internal markets. Defendants’ lawyer built-on these sentiments at argument, charging that the plaintiffs were trying to use their lawsuit to carry off “a massive transfer of wealth” outside of Australia, involv[ing] “the kind of financial imperialism” that seriously offends foreign governments. Indeed, most of the Justices reacted with more sympathy to the foreign governments’ submissions than they did to those of the U.S. government’s lawyer at the lectern. The full transcript of the argument is available here.

Unlike *Abbott*, the outcome of *Morrison* seems predictable—that the prescriptive reach of the Act will be pulled-back—but there remains a live issue of whether the Court would put up a bar only to investors’ lawsuits, or whether it will also restrict the Securities and Exchange Commission’s powers to reach trans-national frauds. The federal government tried to persuade the Court to leave open its ability to enforce the Securities Exchange Act in some trans-national fraud cases—if it decides to reach that question. Both decisions are expected no later than June.

Publication on Oregon's New Choice-of-Law Codification for Torts

Professor Symeon Symeonides, principal draftsman of Oregon's new choice-of-law codification for torts and other non-contractual claims, which went into effect on January 1, 2010, published an article on these rules. This is the first codification of this interesting but difficult subject in a common-law state of the United States, and the second one after the 1991 codification of the civil-law state of Louisiana. The article is entitled *Choice-of-Law. Codification for Torts Conflicts: An Exegesis* (Oregon Law Review 2010) and can be downloaded on SSRN.

Issue 2010/1 Nederlands Internationaal Privaatrecht

The first issue of 2010 of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* includes the following contributions:

Xandra Kramer – Editorial (Lissabon, Stockholm, Boek 10 BW en andere IPR-beloften voor 2010), p. 1-2

J-G Knot – Europees internationaal erfrecht op komst: het voorstel voor een Europese Erfrechtverordening nader belicht (on the Proposal for a European Regulation on Succession and Wills), p. 3-13; here is the English abstract:

> *On 14 October 2009 the European Commission published a proposal for a regulation on succession. This new instrument will harmonise all private international law rules regarding succession, viz. jurisdiction, applicable law and recognition and enforcement, on a European Union level. Furthermore, the Regulation creates a European Certificate of Succession. The rules of this*

Regulation will, after its entry into force, replace the current Dutch private international rules on succession. The Regulation grants general jurisdiction to the courts (a term which entails judicial as well as non-judicial authorities, such as notaries) of the Member State in which the deceased had his or her last habitual residence. Under certain circumstances it is possible to refer to courts of a Member State whose law has been chosen and who are better placed to hear the case. Courts may also have jurisdiction based on the fact that property of the deceased is located in that Member State, if the last habitual residence of the deceased was not in a Member State. The law applicable to the whole of the succession is that of the Member State of the last habitual residence of the deceased. A testator can also expressly choose the application of the law of his or her nationality to the succession of the estate. In this article the rules of the proposal are examined extensively. Differences between the proposal and the existing Dutch rules on private international law of succession are commented upon. One of the biggest changes will be that the different approach with regard to the devolution and the administration of estates in private international law, as currently employed in the Netherlands, will disappear under the European Regulation. The conclusion reads that, notwithstanding the fact that the proposal still needs several improvements, the introduction of a European Succession Regulation will in my opinion contribute to an easier and more effective administration of cross-border successions within Europe.

S.F.G. Rammeloo – Op de valreep… Eenvormige interpretatie door Hof van Justitie EG van artikel 4 EVO (case note on ICF/MIC, ECJ C-133/08), p. 20-26); here is the English abstract:

On 6 October 2009, the ECJ gave an interpretative ruling in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in the preliminary proceedings relate to the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ('objective proper law test'), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in conjunction with subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the

1980 Convention.

L.R. Kiestra – De betekenis van het EVRM voor de internationale gerechtelijke vaststelling van het vaderschap (case note on three Dutch judgments concerning 8 ECHR and the judicial establishment of paternity), p. 27-30; here is the English abstract:

This case note discusses three Dutch cases concerning the meaning of Article 8 ECHR for the judicial establishment of paternity ('gerechtelijke vaststelling van het vaderschap'). All three cases concerned a mother who wanted to establish the paternity of a man over her child(ren). In all three cases a foreign law was applicable to the situation, according to the relevant Dutch choice of law rules ('Wet conflictenrecht afstamming'). Under the applicable foreign laws in the three cases, it was not possible to judicially establish paternity over the child(ren). The Dutch judge had to decide whether this would result in a violation of the ECHR and consequently whether the applicable law had to be set aside on the basis of
the public policy exception. In two of the three cases, the judge came to the conclusion that the normally applicable foreign law had to be set aside, while in one of the cases the judge decided that this was not
necessary. This case note discusses the different outcomes in these three cases and examines a number of issues related to the possible impact of the ECHR on private international law. These include whether or not the ECHR can in fact be at all applicable to such private international law matters and the relationship between the public policy exception and the ECHR.

Richard Fentiman – Book presentation: 'International Commercial Litigation', Oxford University Press 2010, p. 31-32.

Trevor Hartley – Book presentation: 'International Commercial Litigation: Text, Cases and Materials on Private International Law', Cambridge University Press 2009, p. 32-33.

Program on International Commercial Contracts in Ravenna

The Faculty of Law of the University of Bologna and the Center for International Legal Education (CILE) of the University of Pittsburgh School of Law have announced their Summer School program in International Commercial Contracts, which will take place on June 7-11, 2010 at the Ravenna campus of the University of Bologna. The Summer School aims at providing participants with an in-depth understanding of drafting, managing and litigating international contracts under different sources of law, with a focus on selected contracts that are of particular relevance in international practice. Instructors will include academics from the University of Bologna, the University of Pittsburgh, New York University, as well as academics from other top-level European and US institutions and professionals specifically involved in international contract practice. The brochure with all relevant information on applications, fees, schedules and CLE credits, is available here.

ERA Conference International Commercial Transactions

This ERA Conference on International Commercial Transactions takes place on 10-11 June 2010. The objective is to analyse the legal aspects of international commercial transactions with a special focus on cross-border sale of goods.

Key topics include:

– UN Sales Convention (CISG). The CISG represents a landmark in the process of international unification of law. For example, if a company from Germany enters into a sales contract with a business that comes from the US, France or any other of the more than 70 Contracting States, the CISG will apply (unless the parties expressly agree otherwise). It is estimated that 75% of all international

sales transactions worldwide are potentially governed by the CISG. There will be particular emphasis on: drafting international commercial contracts; cross-border sales; application and ambit of the CISG; remedies for breach of contract.

– UNIDROIT Principles of International Commercial Contracts (PICC). The UNIDROIT Principles on international commercial contracts are considered the most important set of rules which parties to an international contract can choose to govern their agreement. Moreover, they are becoming increasingly indispensable in international arbitration. There will be particular emphasis on: use of the PICC in international arbitration; damages; assignment of rights / contracts; coexistence of CISG, PICC and CFR.

Target group is primarily: practitioners of law dealing with transnational commercial law.

Click here for further information

Reminder: Conference on Party Autonomy in Property Law

On 27 and 28 May 2010 a conference on Party Autonomy in Property Law, organized by Erasmus School of Law and Leiden University (the Netherlands), will be held at the Erasmus University Rotterdam, the Netherlands. Leading specialists will present their views on diverse aspects of international property law.

For more information and registration, please click here. See also our previous post.

Preliminary question Dutch Court on Art. 45 Brussels Regulation

In a case concerning the enforcement of a Belgian judgment in the Netherlands, between Prism Investments BV v. J.A. van der Meer qq Arilco Holland BV, the Dutch Supreme Court (HR 12 March 2010, LJN BK4932, 08/04424) referred the following question regarding Art. 45 of the Brussels Regulation to the ECJ **(Case C-139/10)**

> *Does Article 45 of Council Regulation (EC) No 44/2001 [1] preclude the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking the declaration of enforceability on a ground, other than one of those specified in Articles 34 and 35 of that regulation, which has been advanced against enforcement of the judgment declared enforceable and which arose after that judgment had been delivered, such as the ground that there has been compliance with that judgment?*

Abusive Forum Shopping?

On April 28th, 2010, the Paris Court of Appeal dismissed the claim of Vivendi that its shareholders had abused their right to sue by initiating a class action against the company in New York, and thus dismissed the appeal lodged by Vivendi against the first instance judgment.

The argument of Vivendi was that its shareholders had abused their "right to forum shopping" by failling to bring their action before the "natural forum" (*juge naturel*) of the parties, i.e. a French court, and by bringing it instead before a foreign court. To give credit to its case theory, Vivendi, a French company, had only sued a couple of French shareholders in France. The remedy sought was an anti-suit injunction.

I have already summarized the facts of this case in a previous post. Suffice to say that a class action had been initiated in New York by shareholders, many of whom were French, but also many of whom were not. Shares had been traded in France,

but also in the US. The directors of Vivendi were accused of having made financial misrepresentations in the US while living there. Vivendi was accused, and eventually found guilty, of numerous violation of US securities law.

Abuse of Law

So, were French courts the natural forum for this case? The Paris Court of appeal did not think so.

First, it underlined that, in tort matters, the Brussels I Regulation granted jurisdiction to a variety of fora, without establishing any hierarchy between them.

Second, it insisted that there were serious connections indeed between the dispute and the US: shares traded in the US, alleged violations of US law, directors living in NY and making representations there.

Third, it was in no way fraudulent to bring an action in New York for French plaintiffs, who were free to assess and conclude that US law was more favorable to their interests.

Finally, the Court rejected the argument that the issue of the enforceability of the American judgment was at all relevant. There has been debate in France with regard to whether the recognition of a class action judgment would be constitutional. The Court held that the issue was irrelevant, as the American judgment could no doubt be enforced in the US, where Vivendi has significant assets.

So what did Vivendi exactly mean when it argued that French courts were the natural forum for the dispute? As the Court underlined, Vivendi never argued that French courts had exclusive jurisdiction. Vivendi actually relied on an old French case where French courts had been found to be the natural forum for the purpose of applying Article 14 of the French Civil Code. It is hard to see how it could be relevant at all for a dispute falling within the scope of the Brussels I Regulation. But some French scholars find Vivendi's position perfectly legitimate. In an article published two weeks ago in the *Recueil Dalloz* (*Contentieux d'affaires et abus de* forum shopping), professor Daniel Cohen argued that French courts were indeed the natural forum for this dispute, and that the shareholders had abused their right. He concluded that French courts should not become second rank fora, that the French legal order should fight against American judicial imperialism, and

that the Court of appeal had a great opportunity to convey a message to the American court. In a newspaper article published at the same time, Ms Lafarge-Sarkozy, who practises at Proskauer, recognised that the political dimension of the case could hardly be denied.

Remedy

Unfortunately, as the Court did not find that the plaintiffs had abused any of their rights, it did not rule on the remedy. We will have to wait to know whether French courts consider that they have jurisdiction to grant antisuit injunctions (they certainly can be friendly to foreign injunctions). An interesting question is whether the Brussels I Regulation had any impact on their power to do so (yet to be confirmed, to say the least).